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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

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No. 116

J. B. ORCUTT COMPANY, CHARLES DUNCAN, CHARLES H. DAUCHY COMPANY, and Charles Duncan, Trustee in the Matter of Ingalls, Brothers, Bankrupts, Petitioners,

116

vs.

CHARLES H. GREEN and the FULLERTON-POWELL HARDWOOD LUMBER COMPANY et al., Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

CHARLES COWLES TUCKER,
J. MILLER KENYON,
REGINALD S. HUIDEKOPER,
Counsel for Petitioners.

William Boyd, Court Printer, 27 Columbia Street, Albany, N. Y.

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No. .....

J. B. Orcutt Company, Charles Duncan, Charles H. Dauchy Company and Charles Duncan, Trustee in the Matter of Ingalls Brothers, Bankrupts,
Petitioners,

vs.

Charles H. Green, and the Fullerton-Powell Hardwood Lumber Company et al.,
Respondents.

Petition for the writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, requiring it to certify to the Supreme Court of the United States for its revision and determination, the appeal and petition for revision in bankruptcy taken by said Charles H. Green and the Fullerton-Powell Hardwood Lumber Company against J. B. Orcutt Company, Charles Duncan, Charles H. Dauchy Company and Charles Duncan, trustee in bankruptcy of the Ingalls

Brothers, in the matter of Wilber S. Ingalls and Howard R. Ingalls, as individuals and as co-partners of the firm of Ingalls Brothers, bankrupts, in bankruptcy, lately depending in said Circuit Court of Appeals.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the J. B. Orcutt Company, Charles Duncan, Charles H. Dauchy Company, and Charles Duncan, trustee in the matter of Ingalls Brothers, bankrupts, filed under the provisions of section 25a of the Bankruptcy Act of 1898, respectfully represents as follows:

First. This case involves a question entirely novel and one of most vital importance arising under the Bankruptcy Act of 1898. Upon its determination by this court depends to a large extent the usefulness of said act.

On December 3rd, 1903, the Ingalls Brothers were adjudicated bankrupts. Charles Duncan was elected trustee.

In or prior to April, 1903, the J. B. Orcutt Company and the Charles H. Dauchy Company made and verified written proofs of claims against the bankrupts and delivered them to the trustee. On December 19th, 1902, Charles Duncan, the trustee, made and verified a proof of claim of his own against the bankrupts. (Fol. 3.)

Prior to June 1st, 1903, which was before one year after the adjudication, Duncan, the trustee, delivered all three of said proofs of claim properly verified to Henry W. Smith, who was the attorney for the said trustee, with direction to file the same with the referee. (Fol. 5.) The said Henry W. Smith thereafter directed a clerk in his office to file said claim with the referee, which the clerk failed to do. That subsequently said

Smith asked his clerk whether he had filed them and he said he had not; and said Smith then directed his clerk a second time to file them immediately, which the said clerk said he would do. (Fols. 6, 7.)

The claims filed herein prior to December 3, 1903, aggregate about $10,000 and the estate is not large enough to pay them in full. (Fol. 6.) The three claims mentioned herein aggregate upwards of $8,000 (Fols. 2-4.)

On April 2nd, 1904, these three claimants filed with the referee petitions for leave to file such proofs of claims *nunc pro tunc* as of a date prior to December 3rd, 1903. (Fols. 8-9.)

The said Henry W. Smith was not the attorney for any of said claimants, and none of them instructed him to withhold their claims from filing, or knew of any intention on his part of so withholding them, or knew that he had failed to file them until more than a year after said adjudication. (Fol. 8.)

The respondents and others, creditors of said bankrupts, objected to the granting of the relief asked in the said several petitions filed April 2nd, 1904, upon the ground that the proofs of claim had not been seasonably presented to the court, and were barred by section 57a of the Bankruptcy Act. (Fol 9.)

The referee found the facts as herein stated and denied the prayers of the petitioners, refused to receive the proofs of the said three claims on the ground they were presented to him after the expiration of one year after adjudication, and that therefore neither he nor the court had any discretionary power to permit either of said proofs of claims to be filed (fols. 10-11), and made order accordingly. (Fols. 14-16.)

Upon the petitions of Charles H. Dauchy Company, J. B. Orcutt Company and Charles Duncan, dated April 27th, 1904, to the District Court for the Northern District of New York, and upon the certification by the ref-

16 eree to the judge, showing the questions presented, and the findings of fact, which comprise a summary of the evidence relating to the questions presented, and the findings and order of the referee thereon (fols. 17-21), the District Judge made an order on June 28, 1904, that "the proofs of claim of the several petitioners be received and filed by the said referee. (Fols. 22-24.)

17 Thereupon, Charles H. Green, one of the creditors of the said bankrupts, prayed for an appeal from the decision of the District Court to the Circuit Court of Appeals, in his own name (fols. 25-28), which said appeal was allowed, the trustee having declined to take the appeal and to apply for a revision (fols. 31-35) and citations issued thereon. (Fols. 29-31.)

18 Upon the appeal and the petition for review of Charles H. Green and the Fullerton-Powell Hardwood Lumber Company, creditors, the case came on to be heard before the United States Circuit Court of Appeals for the Second Circuit, which said court reversed the order of the District Court, reinstating and affirming the order of the referee, and remanded the case for further proceedings in accordance with the decision.

19 It can readily be observed that if the decree of the Circuit Court of Appeals is permitted to stand it might result in the personal liability of the trustee or his official attorney to the petitioning creditors for the amount of their claim. In view of the circumstances of this case such an enforcement of the claims would be inequitable and unjust in view of the provisions of the Bankruptcy Act, which aim to provide for the pay-

20 ment of claims out of the bankrupt's estate as far as the assets can do so, but does not in any way provide for the payment of claims by third persons other than the bankrupt.

Second. The three questions of law certified by the referee to the District Court, upon which the action of

that court, and of the Circuit Court of Appeals were based are as follows:

1. Does section 57n, or any other provision of the Bankruptcy Act, limit the time within which a proof of claim may be filed to one year or any particular time after adjudication?

2. Am I compelled, or empowered, by General Order XXI (1), or otherwise, under the circumstances of this case, to permit a proof of claim to be filed with me subsequent to one year after adjudication, *nunc pro tunc*, as of a date within said year?

3. Should the relief asked by the petitioners have been granted?

Third. Section 57n of the Act of July 1, 1898, above referrred to, provides as follows: "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment."

Section 57a of the said Act provides: "Proof of claims shall consist of a statement under oath, in writing signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

The General Order XXI (1), above referred to was enacted by the Supreme Court of the United States, in pursuance of the powers conferred by the Constitution and laws upon that court, and particularly by the Bankruptcy Act, section 30, approved July 1, 1898.

Section XXI (1) of the General Orders in Bankruptcy provides *inter alia*, as follows:

"Proofs of debt received by a trustee shall be delivered to the referee to whom the cause is referred."

Fourth. Your petitioners are advised and believe that the said judgment of the Circuit Court of Appeals is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress of the United States approved March 3rd, 1891, wherein it is, amongst other things, provided:

"That in any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." (26 Stat., p. 828, sec. 6.)

Also of the Bankruptcy Act of July 1st, 1898, wherein it is provided by section 25 (2) (d) as follows:

"Controversies may be certified to the Supreme Court of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted."

Fifth. It appears from the opinion of the said Circuit Court of Appeals that:

"The referee rejected the claims, but the District Judge reversed his rulings, evidently to conform the practice in the Northern District to that followed in the Southern District in Re Seff (unreported)."

In the case of In re Seff, the facts are glaringly similar to the facts of the case under consideration. They are as follows:

Certain parties having a claim against this bankrupt, sent it within a year after the adjudication to the trustee, care of his attorney's office, which said claim was returned with notice that it should be filed with the ref-

eree. After the termination of the year after the adjudication the claim was sent to the referee, who returned it on the ground that it had not been filed within one year after adjudication. The court reversed the order of the referee, and ordered that the referee should receive and file the proof of claim as of the date when delivered to the trustee. 31

Your petitioners aver that the decision of the court In re Seff is directly contrary to the ruling of the Circuit Court of Appeals in the case now under consideration, and that it is essential to obtain the ruling of this honorable court upon the questions involved in order to obtain a uniformity of construction by the courts of the Bankruptcy Act of July 1, 1898. 32

As it appears in the opinion of the referee, which by order of the Circuit Court of Appeals, was annexed to its decision and made a supplement thereto, the referee found that "it has become logically necessary to disregard In re Seff." Accordingly, the only decision which could be found in point of facts, was, and necessarily had to be disregarded by the referee and the Circuit Court of Appeals, in order to reach the conclusion they came to, must now stand in the balance against the decision of this case, to be forever a stumbling block for those who wish in the future to learn the true construction of the Bankruptcy Act upon this point. It is, therefore, especially important and desirable that this court should declare the meaning of the said sections 57a, 57n of the Bankruptcy Act, and what effect the last sentence of General Order XXI (1) has in this regard for the guidance of the courts of the United States in the construction of said Act, and of parties having claims against bankrupts in knowing whether the language of General Order XXI (1) is operative to protect their rights or is a snare which they must avoid. 33 34 35

Sixth. Your petitioners aver that the decision of the

Circuit Court of Appeals, in its interpretation of section 57 of the Bankruptcy Act, is contrary to the rulings of this honorable court in the case of Hutchinson v. Otis, 190 U. S. 552, in this, that the rulings of the said Circuit Court in effect holds that no proof of claim can be filed with the referee subsequent to one year after the adjudication while this honorable court held, in the case above cited, that a substituted proof of a claim could be filed after that time. In allowing substituted proof of a claim subsequent to the year after adjudication, this honorable court thereby put a broader construction upon section 57 than was allowed by the Circuit Court of Appeals in the case under consideration, and permitted what, the Circuit Court of Appeals in this case has denied.

Seventh. Your petitioners aver that if this honorable court intended only by General Order in Bankruptcy XXI (1) to designate the trustee as a conduit through whom proofs may be delivered to the referee, that they are entitled to the equitable relief sought. In reliance on that General Order, they proved their claims, within the year after adjudication and delivered them to the trustee, only to discover that a year has elapsed, that through no fault of theirs the proofs failed to reach the referee. The referee concedes that the argument "appeals very strongly to his sense of justice." The equities are undoubtedly as much in favor of the allowance of these claims, as they were in the case of Hutchinson v. Otis, supra, wherein this honorable court allowed substituted proof of claims after the year had passed subsequent to the adjudication of bankruptcy.

Eighth. Your petitioners respectfully submit that the questions thus presented by the said record and the petition should be authoritatively and finally adjudged by this honorable court upon and after a full presentation thereof to the court.

Wherefore your petitioners respectfully pray that a 41
writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Second Circuit, directing and requiring said court to certify and send to this court, on a day certain, to be designated therein, a full and complete transcript of said record in the said Circuit Court of Appeals in the said case, therein entitled Charles H. 42
Green and the Fullerton-Powell Hardwood Lumber Company et al. v. J. B. Orcutt Co., Charles H. Dauchy Co., and Charles Duncan, trustee in the matter of Ingalls Bros., bankrupts, to the end that the petitioners' said case may be reviewed and determined by this court in accordance with the statute in such case made and provided, and that your petitioners may have such other and further relief or remedy in the premises as to this 43
court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in said case and every part thereof, may be reversed by this honorable court.

And your petitioners will ever pray.

By

CHARLES COWLES TUCKER,
J. MILLER KENYON,
REGINALD S. HUIDEKOPER, 44
Attorneys for Petitioners.

District of Columbia, ss.:

Reginald S. Huidekoper, being duly sworn, on oath says that he is one of the attorneys for the above-named petitioners, and that the several matters and things set 45
forth and stated in the foregoing petition by him subscribed are true to the best of his knowledge and belief.

REGINALD S. HUIDEKOPER.

Subscribed and sworn to before me this 11th day of September, A. D., 1905.

CHARLES M. JONES,
(Seal.) Notary Public, D. C.

(Endorsed): In the Supreme Court of the United States, October Term, 1905. No. ....., J. B. Orcutt Company, Charles Duncan, Charles Dauchy Company and Charles Duncan, trustee in the matter of Ingalls Brothers, bankrupts, petitioners, v. Charles H. Green, and the Fullerton-Powell Hardwood Lumber Company et al., respondents. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Second District.

CHARLES COWLES TUCKER,
J. MILLER KENYON,
REGINALD S. HUIDEKOPER,
Counsel for Petitioners.

WASHINGTON, D. C., August 21st, 1905.

H. D. BAILEY, ESQ.,
FRANK H. DEAL, ESQ.,
Attorneys for Respondents,
Troy, New York.

GENTLEMEN:

Please take notice that on Monday, the 16th day of October, A. D. 1905, at the opening of the court, or as soon thereafter as counsel can be heard, the petition of which the foregoing is a copy will be submitted to the Supreme Court of the United States for its consideration and action.

CHARLES COWLES TUCKER,
J. MILLER KENYON,
REGINALD S. HUIDEKOPER,
Attorneys for Petitioners.

Service of a copy of the above notice, and also of the petition for a writ of certiorari and brief in support of the same, acknowledged this ..... day of ...., A. D. 1905.